

**STATE OF CALIFORNIA
OFFICE OF ADMINISTRATIVE LAW
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**AMENDMENT TO TITLE 1, CA CODE OF REGULATIONS REGARDING
ENFORCEMENT OF SECTION 11340.5 OF THE GOVERNMENT CODE**

INITIAL STATEMENT OF REASONS

INTRODUCTION

The rulemaking provisions of the California Administrative Procedure Act (APA, Government Code section 11340 *et seq.*) govern state agency rulemaking. Specifically, the APA establishes procedures that all state agencies must employ to adopt regulations lawfully. Section 11340.5 prohibits any state agency from employing any regulation that has not been lawfully adopted pursuant to APA procedures. Regulations enforced by a state agency that have not been so adopted are called underground regulations.

The Office of Administrative Law (OAL) is charged with enforcement of the APA. This includes the review of allegations that an agency is employing underground regulations (section 11340.5(b)). In March of 2006 OAL adopted regulations to implement, interpret, and make specific the requirements of section 11340.5. These regulations are found in the California Code of Regulations (CCR) at title 1, sections 250-280.

Title 1, CCR, section 260 permits any interested person to file a petition with OAL alleging that a state agency is employing an underground regulation and requesting that OAL issue a determination to that effect. title 1, CCR, section 270 defines how OAL must respond to such a petition. OAL has only two options in responding to a petition pursuant to title 1, CCR, section 270. It may either accept the petition and issue a plenary determination, or it may decline the petition, advising the petitioner specifically that the decision to decline in no way reflects on the merits of the underlying issue presented by the petition.

Experience during the first six months of this process has revealed the need for a simplified process to resolve some comparatively simple petitions. Some petitions are so simple that they could be answered without employing the full determination process. In such cases OAL should be able to advise the petitioners of the facts without requiring resort to the full determination process. Current regulations do not permit this.

The proposed regulations allow such an intermediate process by permitting OAL to issue summary disposition letters in those cases in which it is clear, based upon the facts stated in the petition, that the challenged rule is not an underground regulation. If OAL is able to determine, based upon the contents of the petition, that the challenged rule clearly is not an underground regulation, it may so advise the petitioner when it responds to the petition. This provides the petitioner with a resolution to the issue without requiring the formal notice, agency response, and public comment opportunity that are required for a plenary determination.

OAL's experience in the first six months implementing title 1, CCR, section 270 have revealed that 30 days is often not enough to ensure adequate analysis of a petition before making a decision whether or not to accept it. Difficulty in coordinating consultation with state agencies and delays in receiving information from those agencies frequently result in decisions being forced by the 30-day deadline rather than by completion of an adequate analysis. The proposed amendment allowing issuance of summary disposition letters will only increase the OAL workload during this initial review period. The proposed regulation would increase the initial review period from 30 days to 60 days. In order to ensure that petitions continue to be dealt with expeditiously, the deadline for issuing a formal determination on an accepted petition is reduced from 150 days to 120 days. The result of these two changes is that OAL's internal deadline for making the initial decision to accept or decline a petition is changed, but the total time from the submission of the petition to the deadline for issuance of a determination remains unchanged.

Finally, the proposal would amend current regulations to provide that public comments received regarding a petition that has been accepted for issuance of a formal determination may be disregarded if they are not received within 45 days of the publication of the petition in the California Regulatory Notice Register. The current regulations do not establish a time limit on public comments.

SPECIFIC PURPOSE OF EACH SECTION – GOVERNMENT CODE 11346.2(b)(1)

The specific purpose of each adoption, and the rationale for the determination that each adoption is reasonably necessary to carry out the purpose for which it is proposed, together with a description of the public problem, administrative requirement, or other condition or circumstance that each adoption is intended to address, is as follows:

Proposed Section 270(a). This is a nonsubstantive change to correct a typographical error in the existing regulation.

Proposed Section 270(b). This amendment increases, from 30 days to 60 days, the time available to OAL to complete its initial evaluation of petitions. It is necessary because 30 days has proven to be inadequate to complete a full evaluation of the petitions in some cases and because other changes being proposed to section 270 will increase the amount of work that OAL must complete during the initial review period. The increase from 30 to 60 days is based upon experience under the existing rules. There is no single absolutely correct number of days for the initial review period. Sixty days is a reasonable time to meet the competing needs that OAL have adequate review time and that petitioners receive prompt consideration of petitions.

Proposed Section 270(e). This amendment is necessary in order to delineate the two choices that the amended regulation makes available to OAL when it elects to consider a petition on its merits. The deleted language in this section ("notify the petitioner and . . .") is relocated to section 270(g). The deletion from this section, therefore, is nonsubstantive.

Proposed Section 270(f). This provision establishes the requirements of summary disposition letters. Summary disposition letters are necessary in order to allow OAL to resolve those

petitions in which it is clear that the challenged rule is not an underground regulation. The current regulation only permits OAL to decline a petition without addressing the merits or to accept the petition and conduct the full process to produce a plenary determination. Efficiency in administering Government Code section 11340.5 requires the use of a simpler process when the challenged rule clearly is not an underground regulation. Section 270(f) provides that process. The specific individual provisions of proposed section 270(f) are as follows:

Proposed Section 270(f)(1). This subsection establishes the use of summary disposition letters and establishes the rule that summary disposition letters may be issued only when the facts presented in the petition or obtained by OAL during its review demonstrate clearly that the challenged rule is not an underground regulation. The rule saying that The “clear demonstration” standard is necessary to guide OAL in determining when a summary disposition letter is appropriate.

Summary disposition letters are necessary to provide an expedited process by which OAL may provide a substantive response to a petition which does not otherwise raise questions that require the full determination process for resolution. Assume, for example, that OAL receives a petition alleging that an agency is employing an underground regulation and discovers that the purported underground regulation is not an underground regulation because it has been adopted pursuant to the APA and published in the CCR. In this case OAL should be able to explain this to the petitioner. OAL often receives petitions alleging that a rule employed only in a specific prison constitutes an underground regulation even though the rule is clearly exempt from APA rulemaking requirements pursuant to section 5058(c)(1) of the Penal Code. In these and similar circumstances OAL would provide much better service to the public if it could issue letters explaining why a challenged rule is not an underground regulation without having to go through the full determinations process.

Section 270(f)(1) also makes it explicit that a summary disposition letter cannot be used to declare that a state agency rule is an underground regulation. This is, of course, implied by the standard allowing summary disposition letters only when facts show that the challenged rule is not an underground regulation. This provision is necessary to make this implication explicit and to eliminate any possibility of misinterpretation. Summary disposition letters may be issued without any formal participation by the agency alleged to have employed the underground regulation. It would not be fair to issue a letter declaring that an agency had employed an underground regulation without providing the agency with a formal opportunity to respond to the petition.

Proposed Section 270(f)(2). This amendment provides a list of circumstances that may justify the use of a summary disposition letter. The list is not exhaustive; it is exemplary. This provision is necessary in order to guide OAL in determining whether or not to issue a summary disposition letter.

Proposed Section 270(f)(3). This amendment specifies two content elements that must be in every summary disposition letter. First, it requires that the summary disposition letter state the basis for concluding that the challenged rule is not an underground

regulation. This is necessary to ensure that petitioners receive some substantive resolution to their petitions.

This section also requires each summary disposition letter to specify that OAL's summary disposition does not preclude the petitioner from going to court to challenge the legality of the alleged underground regulation. This provision is necessary in order to ensure that recipients of summary disposition letters understand that OAL's action cannot and does not restrict their access to the courts.

Proposed Section 270(f)(4). This section specifies that any summary disposition letter must be issued not more than 60 days following OAL's receipt of the petition. Some type of time limit on issuing letters is necessary in order to ensure orderly administration of the OAL program for reviewing and responding to underground regulation petitions. As with the deadline for deciding whether to accept or decline a petition, 60 days is chosen as a reasonable time to meet the competing needs that OAL have adequate time to review the petition and issue the letter, and that petitioners receive prompt consideration of petitions.

Proposed Section 270(g). The proposed amendment defines what OAL is required to do if it elects to issue a determination. This is necessary in order to specify a single formal procedure that must be followed whenever a plenary determination is to be prepared and issued. The substance of these provisions is currently operative in title 1, CCR section 270(e). Listing these requirements here is, therefore, a nonsubstantive amendment to the regulations.

Also, this section would amend current regulations to provide that public comments received regarding a petition that has been accepted for issuance of a formal determination may be disregarded if they are not received within 45 days of the publication of the petition in the California Regulatory Notice Register. The current regulations do not establish a time limit on public comments. The proposed 45-day limit is necessary in order ensure expeditious processing of determinations. It is written as authorization for OAL to disregard comments received after the deadline so that it will define the time period during which the public may submit comments as a matter of right (within 45 days) but will not prohibit OAL, at its discretion, from considering comments received after the 45-day deadline. The 45-day limit was selected because it is the total of the time available for agency comments pursuant to proposed section 270(h) and for the petitioner's response to the agency comments pursuant to proposed section 270(i). In addition, 45 days is the period for public comment on regular rulemaking pursuant to Government Code section 11346.4 and has been proven to be a workable deadline in that context.

Proposed Section 270(j). This amendment reduces the time for preparation of a formal determination from 150 days to 120 days. This is necessary to ensure that the total time during which a petition may be under review by OAL is not changed by the proposed amendment to section 270(b).

Modification of Subsection Numbers. Subsection numbering for existing subsections 270(f) through 270(i) is changed to reflect the addition of new subsections (f) and (g). These changes are nonsubstantive and are necessary for clarity of display.

OTHER REQUIRED SHOWINGS – GOVERNMENT CODE 11346.2(b)(2)-(4)

Studies, Reports, or Documents Relied Upon – Gov. Code 11346.2(b)(2): None.

Reasonable Alternatives Considered – Gov. Code 11346.2(b)(3)(A): None

Reasonable Alternatives That Would Lessen the Impact on Small Businesses – Gov. Code 11346.2(b)(3)(B): None

Evidence Relied Upon to Support the Initial Determination That the Regulation Will Not Have A Significant Adverse Economic Impact On Business – Gov. Code 11346.2(b)(4):
The proposed regulation has no significant impact upon any entity other than OAL since it does nothing except modify the possible responses that OAL may take to a petition alleging the use of underground regulations. Any incidental economic impact upon business, or upon any petitioner, would be favorable since the proposal allows OAL to provide petitioners with more complete information about underground regulations than is allowed by current rules. Petitioners will be able to use the information obtained in summary disposition letters to evaluate potential responses to state agency actions more cost-effectively. Summary disposition letters will help petitioners avoid the cost of undertaking unsuccessful litigation.